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When Mitigation Isn't Mitigation
The Court of Appeal for Ontario Errs

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In a recent decision, the Court of Appeal for Ontario erred when it excluded from "mitigation income" all earnings by a dismissed employee during what the court referred to as the "statutory entitlement period"[1](*Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (Feldman, Gillese and Pepall, JJ.A.)).

In a separate but concurring judgement, Justice Feldman also erred when she held "mitigation income" did not include earnings from a position so inferior to the original position the employee would not be in breach of the duty to mitigate if he or she had not taken the job.

As we explain in this article, there is no principled basis to exclude from "mitigation income" any earnings accrued during the period of notice, except income earned from "supplementary employment" (that would have been earned in any event). As for Justice Feldman's reasons, they are neither binding nor accepted by the majority. Yet, they are nevertheless troubling in that they raise an argument which, while unsound in law, is likely to muddy already murky waters.

That said, the familiar adage of 'bad facts make bad law' may be to blame. In the case before the court, the employee's circumstances were sympathetic and the employer's behaviour less than exemplary. It is therefore possible the court made these rulings in an effort to help the plaintiff keep more money in her pocket. However, when the Court of Appeal speaks, other courts must listen, and the law of employment mitigation may now have changed, in error.

[1] The "statutory entitlement period" is a notional period, devised by the court, reflecting the aggregate number of weeks used to calculate statutory pay in *lieu* of notice, and severance. It is not an actual period of time. Pay in *lieu* of notice and severance are payments. In fact, severance must be paid out as a lump sum.

What happened in this case?

For more than 25 years Ms. Brake was a good employee for a large fast food chain, initially at an entry level and eventually in a managerial position. In the final years of her employment, Ms. Brake's performance slipped slightly. She also began supplementing her income with part-time work as a cashier with Sobey's. Ultimately, Ms. Brake was dismissed from her full-time position with the fast food chain allegedly with cause because of poor performance.

The details of Ms. Brake's performance issues are not material for the purposes of the court's discussion of mitigation. However, because the facts of any case will influence the court's view of the fair and just result, suffice it to say, both the trial and appeal courts found Ms. Brake's dismissal to have been less than fair. This includes her participation in a performance management program the courts found was applied unfairly and "set up" to ensure Ms. Brake would fail.

Against this backdrop, it is not surprising that when, near the end of her employment, Ms. Brake was offered and rejected a demotion and then fired with allegations of cause, the court found the demotion to be a constructive dismissal. It awarded damages equivalent to 20 months' pay ($104,499.33), inclusive of common law entitlements and statutory entitlements (*Employment Standards Act* ("*ESA*") pay in *lieu* of eight weeks' notice, and severance pay (equivalent of 26 weeks)).

Significantly, the court refused to deduct from the damage award <u>any</u> of Ms. Brake's earnings during the notional "statutory entitlement period"[2], totalling $40,000, because that money was not "received in mitigation of loss".

Why was Ms. Brake's post dismissal income not "mitigation income"?

Typically, an employee's earnings during the notice period are considered "mitigation income" and deducted from any award of common law damages. If an employee rebounds quickly after a termination, this can save the employer a lot of money.

In the 20 months following Ms. Brake's dismissal, the court found she made reasonable efforts to find alternative employment and earned $40,000 by increasing her hours at Sobey's and working non-managerial positions at Tim Horton's and Home Depot.

In the ordinary course, one might expect some if not all of the $40,000 to be deducted from the damage award on account of it being "mitigation (replacement) income". *Not so*, said the court.

In a surprising ruling, the trial judge and Court of Appeal held that <u>none</u> of that $40,000 was "received in mitigation of loss". The Court of Appeal's reasoning is essentially three-fold:

1. **Supplementary income earned during the period of common law notice is not "mitigation income"**: If an employee works two jobs, and is dismissed without cause

[2] *Ibid*

from one job, income earned during the common law notice period from the second job is not "mitigation (replacement) income" because the employee would have earned that income in any event.

This aspect of the court's ruling is not controversial, and is the basis on which the court excludes much of Ms. Brake's post dismissal earnings from Sobey's.

Significantly, the Court of Appeal expressly declines to identify whether and in what circumstances an *increase* in supplementary income during the notice period would change the character of that income (or at least the increased part) from *supplementary* to income *replacement* (and therefore "mitigation income"). That analysis, the court says, is "for another day".

2. **All earnings accrued during the "statutory entitlement period" are not "mitigation income"**: Here, the court errs by confusing statutory payments (pay in *lieu* of notice and severance) with all other income earned during the notice period. We all agree the former cannot be reduced by mitigation. However, the latter (excluding supplementary income) is mitigation income regardless of when it was earned.

How does the court make this error?

The court begins by confirming that statutory termination payments (pay in *lieu* of notice and severance) are not replacement income and therefore not to be reduced by "mitigation income". They are mandated, minimum sums, payable in any event, even if the employee secures new employment the very next day at no loss of income. As authority for this principle, the court relies on *Boland v. APV Canada Inc*. (2005), 250 DLR (4th) 376 (Ont Div Ct). This aspect of the decision is not controversial.

However, the court then errs by extending the principle in *Boland* to exclude from "mitigation income" any income earned during the notional "statutory entitlement period", in this case 34 weeks or 8.5 months. Unfortunately, the court misunderstood and/or misapplied *Boland*.

First, the term "statutory entitlement period" is misleading which is perhaps a reason why it has been misapplied. As noted earlier, the "statutory entitlement period" is not an actual period of time; it is a notional period used only to calculate the statutory payments.

Second, there is no principled basis on which to apply this notional period to create an actual period within which post dismissal income (not including supplementary income) is excluded from "mitigation income". In fact, other than a misreading of *Boland*, no substantive explanation is offered.

Third, in *Boland*, the employee claimed only the minimum statutory entitlement (*ESA* notice and severance pay). There was no claim for common law damages and the judge rightly declined to deduct the employee's post dismissal earnings from the statutory entitlement. Had there been a claim for common law damages, the court would have

reduced the claim by the amount of the statutory notice and severance payments and any income earned during the notice period, regardless when it was earned. This is consistent with the decision of *Yanez v. Canac Kitchens* [2004] OJ No 5238 (Sup Ct), in which Echlin J. deducted from the common law notice entitlement all earnings post dismissal, despite some earnings having accrued in what the Court of Appeal describes as the "statutory entitlement period".

It is therefore incorrect to rely on *Boland* as authority for the proposition that all earnings during the notional "statutory entitlement period" are not "mitigation income". Those were not the facts in *Boland*, nor does the decision stand for that proposition.

The Court of Appeal ought to have treated all post dismissal income (except supplementary income) as "mitigation income".

3. Income earned from a non-comparable job during the period of common law notice may not be deducted: This is another error.

In a separate but concurring decision, Justice Feldman (expanding on comments of the trial judge) went even further, holding "mitigation income" does not include earnings from a position so inferior (and therefore not "comparable") to the original position the employee would not be in breach of the duty to mitigate if he or she turned down the position. In other words, if it is unreasonable to expect the dismissed employee to accept the inferior position as a means of mitigation, it is unreasonable to treat earnings from that position as "mitigation income"

On this basis, Justice Feldman excludes all of Ms. Brake's income earned during the common law notice period.

However, in reaching this conclusion, Justice Feldman confuses an employee's *right to not accept replacement work markedly inferior to the original job as a means of mitigation* with *income earned during the period of notice*. That is, although an employee may not be obliged to accept an inferior position as a means of mitigating damage, once accepted, income earned should be treated as replacement/mitigation income. If not, the employee is unjustly enriched by benefitting twice – once from the replacement earnings and a second time from the damage award.

Although the majority did not directly reference Justice Feldman's reasons, the majority was clear to distance itself from this narrow interpretation of mitigation income:

> To the extent the trial judge was suggesting that the court did not need to consider whether income received from a job that was inferior to the one from which the employee was dismissed was mitigation income, I respectfully disagree. That approach does not accord with the principle that employment income earned during the notice period is generally to be treated as mitigation of loss.

Lessons for Employers

This decision stands as a reminder to employers of the importance of treating a dismissed employee as fairly as possible; including doing whatever can reasonably and appropriately be done to assist the employee find comparable replacement work. The sooner the employee gets back on his or her feet, the better for everyone.

That said, the error of excluding from "mitigation income" all income earned during the notional "statutory entitlement period" is disappointing and will need to be corrected, either by the Court of Appeal or Supreme Court of Canada. As of the writing of this article, neither party has sought leave to appeal to the Supreme Court of Canada.

Finally, Justice Feldman's concurring decision, though neither accepted by the majority nor binding, is troubling to the extent it even suggests "mitigation income" does not include earnings from work not comparable to the original position. That proposition is simply inconsistent with the law of mitigation.

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